Supreme Court of the United States

October Term, 1978

No. 78-135

ARNOLD R. JAGO, Superintendent,
Petitioner,

vs.

HARLLEL JONES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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ARNOLD R. JAGO, Superintendent,
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HARLLEL JONES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

The Prosecuting Attorney of Cuyahoga County, on behalf of the State of Ohio, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit is unreported, but is printed in the Appendix, *infra,* p. A1. The opinion of the Federal District Court is unreported, but printed in the Appendix, *infra,* p. A11.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was decided and filed on May 3, 1978. A motion to stay issuance of the mandate was granted on May 30, 1978. The motion to extend the order staying the issuance of the mandate was granted by the Court of Appeals on July 3, 1978.

This Court has jurisdiction to grant this petition under United States Code, Title 28, Section 1254(1), which provides for review by writ of certiorari of any case in the courts of appeal.

QUESTIONS PRESENTED

Whether a statement of a witness in the prosecutor's possession must be classified as exculpatory when the statement makes no reference to the defendant.

Whether, a suppression of evidence can exist when a written statement of a witness in the prosecution's possession is not provided to the defense counsel prior to trial, and the defense counsel is aware of the identity and location of the witness, and the witness is equally available for the defense to interview, and the witness does provide the defendant's investigator with a signed statement prior to trial, which is substantially the same as that given by the witness to the police, and the same attorney is representing both the defendant and the potential witness.

Whether, this Court's decisions in *Brady v. Maryland*, 373 U.S. 83 (1963); *Moore v. Illinois*, 408 U.S. 786 (1972);

and *United States v. Agurs*, 427 U.S. 97 (1976), apply to the disclosure of a witness' statement in the prosecutor's possession, where the defense has the substantially identical statement given to them by the same witness.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . ."

STATEMENT

On October 12, 1971, an indictment was returned charging the following persons with murder in the first degree in the killing of John Howard Smith on August 7, 1970, and of the shooting of Harlow Tate on August 7, 1970: Harllel Jones, a.k.a. Harllel X; Donald Williams, a.k.a. Judea; Marvin Bobo, a.k.a. Bo X; James E. Moore, a.k.a. Jamay; and Robert Perry, a.k.a. Amir Ali.

Respondent, Harllel Jones, was convicted in the Court of Common Pleas of Cuyahoga County, Ohio, of murder in the second degree and of shooting with intent to kill or wound. Respondent's convictions were affirmed in direct appeals and in collateral proceedings. Respondent filed a petition for a writ of habeas corpus in the district court, alleging nine separate reasons for his claim that his state conviction was void. The district court conducted an evidentiary hearing and entered judgment granting the petition for habeas corpus. Further, the district court ordered that Jones be released unless he was retried within ninety days. To clarify the issue presented *sub judice*

the Petitioner presents some of the pertinent facts developed at the evidentiary hearing in the Federal district court.

On August 7, 1970, two shootings occurred in Cleveland, resulting in the death of John Howard Smith and the wounding of Harlow Tate. The State did not charge that Respondent had directly participated in the shootings, but charged that as the head of an organization called the "Afro Set," Respondent called a "red alert" meeting of its members and ordered them randomly to shoot security guards and police officers in retaliation for the earlier fatal shooting of Willie Lofton, an Afro Set member.

During Respondent's trial, the principal testimony against him was furnished by co-defendant, Robert Perry, also a member of the Afro Set, who had become a confidential government informant a few months before trial. Perry testified that the shootings were preceded by a meeting at the Afro Set headquarters presided over by Jones, and that among those present besides himself and Jones were the other defendants, and Victor Harvey, then 15 years old. Perry testified that Respondent Jones had supplied Harvey with a shotgun from his office. This testimony was corroborated by Kenneth Malone, another Afro Set member. Respondent did not testify at his trial. For the Respondent, two other members of the Afro Set testified that the retaliatory action took place without knowledge on the part of Harllel Jones.

The 15 year old Victor Harvey was questioned by Cleveland Police Officers at the juvenile detention center. Harvey was charged with being a delinquent child for his participation in the shooting spree. *Harvey was represented by the same attorney representing Respondent, Harllel Jones.* Harvey gave a statement to the police, which related his own participation and the participation

of others in the shootings. A reading of his statement reveals that Harvey made no mention of any meeting at the Afro Set headquarters as later described by Perry. Harvey stated that he heard about the killing of Lofton, an Afro Set member, at the Afro Shop. Afterwards, Harvey stated that he went to the McDonald's restaurant where Lofton had been shot. In his statement, Harvey related that, sometime later, he noticed a shotgun in the trunk of Marvin Bobo's car. There is no mention by Harvey of Harllel Jones having furnished the shotgun to Harvey. *Victor Harvey gave the defense attorney's investigator representing both him and Respondent a "substantially similar statement" as that given to the police.* See, Opinion of district court, Appendix, *infra.* p. A21. The district court described Harvey's statement as being "not unambiguous". See, Opinion of district court, Appendix, *infra*, p. A15.

Prior to trial, Harvey was declared a material witness for the State and the delinquency charges pending against him were dismissed. *Victor Harvey was freely available to the defense. No impediment barred Respondent's attorney, who also represented Harvey, from discussing with Harvey any statements he had given to the police. Neither the State nor the defense called Harvey as a witness during Respondent Jones' trial.* Both were free to call Harvey if they desired. Also, prior to Respondent's trial, his counsel made a demand upon the prosecution that it produce all exculpatory statements in its possession given by Victor Harvey. The trial court ordered the prosecution to provide the defense with any exculpatory material favorable to the defense. The State denied having any exculpatory evidence from Harvey or anyone else and did not turn over to the defense Harvey's statement.

The district court and the Court of Appeals held that the non-disclosure of Harvey's statement by the prose-

cution, of which the defense had in its possession a "substantially similar statement" from Harvey, violated Respondent's right to due process under the Fourteenth Amendment as described in *Brady v. Maryland*, 373 U.S. 83 (1963); *Moore v. Illinois*, 408 U.S. 786 (1972); and *United States v. Agurs*, 427 U.S. 97 (1976).

REASONS FOR GRANTING THE WRIT

In holding that the prosecutor's failure to reveal an "exculpatory" eyewitness statement to defense counsel constituted reversible error, the Court of Appeals has rendered a decision on an important question of constitutional law that conflicts with the decisions of this Court. Moreover, the decision below is of great practical significance because of its broad implications for discovery procedures that the prosecution must employ in handling all criminal cases.

The Court of Appeals decision ruling that a witness' statement is exculpatory even though it makes no reference to the Respondent, and of which the defense counsel has a substantially similar statement by the same witness in its possession, represents an unwarranted expansion of this Court's opinion in *United States v. Agurs, supra*. Because of the uncertainties created by this decision, guidance from this Court is needed to enable the State to formulate standards for the training and instruction of its attorneys in their responsibilities to disclose evidence to criminal defendants.

1. We recognize that the State's failure to disclose exculpatory evidence to a criminal defendant and to prevent submission to the jury of evidence known to be false constitutes a denial of due process of law when the evidence itself is material to the jury's determination. *Giglio*

v. United States, 405 U.S. 150 (1972). Even if no false evidence is submitted to the jury, the prosecutor's wrongful failure to disclose exculpatory evidence to the defense may violate due process requirements. *Brady v. Maryland, supra*. The rule of *Brady* involves the discovery, after trial, of information which had been known to the prosecution, *but unknown to the defense*. *Agurs, supra* at 103.

In this case, the Court of Appeals defined the issue as "an unusual question concerning the applicability of *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Agurs*, 427 U.S. 97 (1976), and whether under those cases an eyewitness statement suppressed by the government can be exculpatory where it makes no reference to the defendant." See, Appendix, *infra*, p. A1. The Court of Appeals concluded that the statement of an eyewitness to a crime which makes no reference as to the presence or participation of the defendant must be viewed as potentially powerful exculpation. Underlying the Court of Appeals' conclusion is the assumption that the prosecutor has a constitutional obligation to disclose any information that might affect the jury's verdict. That statement of the "sporting theory of justice" was expressly rejected in *Brady, supra* at 90-91. Likewise, in *Agurs*, this Court recognized that the mere possibility that an item of undisclosed information might help the defense, or might affect the outcome of a trial, does not establish "materiality" in the constitutional sense. *Agurs* at 109, 110. This Court has expressly stated that the prosecution does not have to disclose a complete and detailed accounting to the defense of all police investigatory work. See, *Moore v. Illinois, supra* at 795.

A statement in the possession of the State which makes no reference to the defendant cannot be categorized as

exculpatory. *U. S. v. Rhodes,* 569 F.2d 384, 388 (5th Cir., 1978). A witness for many subjective reasons will not place in a statement all of his or her knowledge about criminal activity that was observed.[1] For the Court of Appeals to hold that a statement which makes no reference to the defendant must be clearly exculpatory is unreasonable and illogical.

The prosecution contends that the constitution does not require a prosecutor to draw negative inferences by omission in deciding if a statement is exculpatory. A prosecutor starts off with an adversary view of his theory of the case. When requested to determine whether a statement is exculpatory, the statement will be reviewed to ascertain whether an element of the State's case is negated. In the present case, the absence of any reference to the Respondent does not negate any element of the State's case. The absence of any mention of Respondent's involvement or of a meeting does not mean it did not happen. Nor does it mean that a witness would testify in that manner. The statement is not exculpatory because it is silent.

2. The Court of Appeals' Opinion fails to respond to the State's argument that no suppression occurred because the defense was possessed, prior to trial, of a similar statement by the same witness. *Respondent's attorney represented Victor Harvey, a 15 year old who was charged with delinquency for his participation in the shootings. Respondent's investigator obtained a statement from Harvey as to his knowledge of the shootings.* Members of

1. For example, in this case, the witness Harvey was a member of the militant Afro Set headed by Respondent, Harllel Jones. Also, Harvey was a participant in the shootings. Clearly the Court of Appeals could have likewise inferred that the *testimony* of Harvey would be more favorable to the State rather than to the defense, since Harvey's statement corroborated much of the testimony of the State's witnesses.

the Cleveland Police Department interviewed Harvey in the juvenile detention facility and obtained a statement. *The statement in the prosecutor's possession was substantially the same as the one in the Respondent's possession prior to trial.* The juvenile Harvey was never called to testify on behalf of the State. Nor did the defense call Harvey to the stand. The defense was aware, prior to and during trial, of the identity and location of Harvey. Harvey was openly available to the defense if they chose to call him as a witness. Despite the Respondent's representation of Harvey, and despite the uncontroverted fact that Respondent had in its possession a substantially similar statement as that in the prosecutor's files, the Court of Appeals held that the prosecutor intentionally suppressed evidence favorable to the defense. The Opinion of the Court of Appeals does not answer the question of how the State can suppress a statement where the defense has a substantially similar statement from the same witness prior to trial.

The Court of Appeals held that the defense was restrained from using Harvey as a witness by the fear that Harvey had made a statement incriminating the Respondent. The fact that a statement is not exculpatory does not necessarily imply that it is incriminating. If the State had in its possession an "incriminating" statement in regard to Respondent, which the district court held was reasonable for the defense to believe, then it would appear reasonable to conclude from the viewpoint of the defense that the State would have used him as a witness and would have used the alleged incriminating statement to refresh his recollection had he testified favorably to the defense. Obviously, the prosecution did not feel that the statement incriminated Respondent Jones. Since the prosecution did not call Harvey as a witness, then any "fear" of an incriminating statement should have greatly diminished.

3. In holding that the Respondent Jones was denied a fair trial, the Court of Appeals relied primarily on the authority of *Brady v. Maryland, supra*; *Moore v. Illinois, supra*; and *United States v. Agurs, supra*. Implied in these cases is that the prosecution suppressed evidence favorable to the defendant that the defendant was *unaware of*. The district court conceded in its memorandum opinion that the defense investigator, *prior to trial,* had obtained a statement from Harvey and that this statement was favorable to the defense and apparently consistent with the statement taken by the prosecution.

The question then is, how could the prosecutor suppress evidence allegedly favorable to Respondent when Respondent already had his own statement from the witness, and the district court concedes that the testimony would have been substantially the same as that given in the statement taken by the prosecution. They not only had a statement taken by the investigator for Respondent prior to trial, in substance the same as the one taken by the prosecution, but in addition thereto the same lawyers were representing both Respondent and the witness Victor Harvey.

In view of the fact that the defense had their investigator's statement from witness Harvey, substantially the same as the statement taken by the prosecution, and in view of the fact that the same lawyers were representing both Respondent Jones and Harvey, it is inconceivable that the defense was not, in fact, aware of the testimony that Harvey would give if called as a witness. Since they were aware of his testimony, it is totally unreasonable and incredible to state that the prosecution suppressed said evidence when, in fact, it was fully known by the defense and they had every opportunity to call Harvey as their own witness if they so desired. Yet, the defense

chose not to call Harvey and now attempts to place the blame for this on the prosecution. With the statement obviously not incriminating to Respondent, the State is placed in the nebulous position of having to draw an inference that the omission of any reference to Respondent Jones in the statement is exculpatory or favorable "on its face" notwithstanding the fact that the prosecution had every reason to believe that the statement suggested nothing to the involvement or non-involvement of Respondent, but referred only to involvement of Harvey.

In this case, the materiality standard of *Brady, supra,* has not been violated. The defense had the functional equivalent of the statement—or better—they had Harvey. *Harvey's statement is not material because it is not admissible in and of itself.* It only has relevance if Harvey takes the stand, affirms it as being his, and supplies the negative inferences Respondent seeks to draw. It, moreover, is not material as a source of evidence to an *undisclosed* witness, for as above, Harvey was well known to the defense.

4. The decision below has potentially revolutionary implications for the standards of conduct governing the behavior of state and federal government prosecutors in almost all criminal cases. *The Court of Appeals has effectively required the prosecutor to make an accurate pretrial analysis, at the risk of reversal, of the possible utility of all information in its files to the defendant at the forthcoming trial including drawing favorable defense inferences from omissions of any reference to defendants in all criminal statements.* If the course of trial should thereafter reveal that evidence not selected for disclosure might have been material to the jury's determination, the resulting verdict becomes subject to successful attack. The costs and delay are evident. Given the unpredictable nature

of trial proceedings and the obvious institutional interests in avoiding retrials, the operational effect of the Court of Appeals' ruling will be a dramatic expansion of discovery in criminal cases, thereby significantly altering the traditional character of criminal trials. See, *Giles v. Maryland*, 386 U.S. 66, 119 (1967) (Harlan, *J.*, dissenting).

The ruling below creates substantial confusion about the standards utilized by prosecutors in instructing their subordinates of their *Brady* and *Agurs* responsibilities and requires clarification by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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APPENDIX

OPINON OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed May 3, 1978)

Nos. 77-3182 and 3183

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HARLLEL B. JONES,
Petitioner-Appellee Cross-Appellant,

v.

A. R. JAGO, Superintendent,
Respondent-Appellant Cross-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Before: CELEBREZZE and ENGEL, *Circuit Judges* and GRAY, *Senior District Judge.**

ENGEL, *Circuit Judge.* This appeal presents an "*unusual*" question concerning the applicability of *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Agurs*, 427 U.S. 97 (1976), and whether under those cases an eyewitness statement suppressed by the government can be exculpatory where it makes no reference to the defendant.

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*Hon. Frank Gray, Jr., Senior Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

Harllel Jones was convicted in the Court of Common Pleas of Cuyahoga County, Ohio, of murder in the second degree and of shooting with intent to kill or wound. Having exhausted his state court remedies both in direct appeals and in collateral proceedings, Jones filed a petition for a writ of habeas corpus in the district court asserting nine separate reasons for his claim that his state conviction was void. Following a lengthy evidentiary hearing, the district court entered judgment granting the petition for habeas corpus and ordering that Jones be released unless he was retried within ninety days.[1] We summarize the facts developed at the evidentiary hearing only to the extent necessary to an understanding of the issue reached herein.[2]

On August 7, 1970, two shootings occurred in Cleveland resulting in the death of one John Howard Smith and the wounding of one Harlow Tate. More than a year later, Jones was indicted for the offenses along with Marvin Bobo, Victor Harvey, James Moore, Donald Williams, and Robert Perry. The state did not allege that Jones had directly participated in the shooting, but charged that as the head of an organization called the "Afro Set," he called a "red alert" meeting of its members and ordered them randomly to shoot security guards and police officers in retaliation for the earlier fatal shooting of an Afro Set member. The state further claimed that at the same meeting Jones gave Victor Harvey a shotgun with which to carry out those instructions.

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1. In connection with the judgment, the district court released Jones pending appeal upon furnishing a $10,000 bond, 10% deposit. Our court upheld the district judge's authority to grant a release in *Jago v. United States District Court*, No. 77-3333 (6th Cir., filed February 2, 1978).

2. The district court properly held an evidentiary hearing, because there were inadequate factual findings upon which to make the determination of the *Brady* issue raised in the petition.

In his defense, Jones denied ever having given any such instructions, having furnished the shotgun to Harvey, or having otherwise participated in the crimes. The evidence was sharply disputed.

At his trial the principal testimony against Jones was furnished by co-defendant Robert Perry, a member of the Afro Set, who had become a confidential government informant a few months before trial. It was Perry's testimony that the shootings were preceded by a meeting at the Afro Set headquarters presided over by Jones, and that among those present beside himself and Jones were the other defendants, including Victor Harvey, then 15 years old. Perry testified that Jones had supplied Harvey with a shotgun from his office. This testimony was corroborated by another Afro Set member, Kenneth Malone. For the defendant two other members of the same group testified that the entire retaliatory action took place without any authorization or knowledge on the part of Harllel Jones. One of them, Marvin Bobo, also testified that he, not Jones, had given Victor Harvey a shotgun from the trunk of his car.

While in detention at a juvenile home, Victor Harvey was questioned by local police officers and gave a statement, which related in detail his own participation and the participation of others in the shooting spree. However, it made no mention at all of any meeting at the Afro Set headquarters as later described by Perry. Instead Harvey stated that he heard of the killing of the Afro Set member while he was at their headquarters. Thereafter he went to a McDonald's restaurant with the others, and later they separated into two groups for the purpose of the shootings. His statement included the comment that he noticed a shotgun in the trunk of Marvin Bobo's car. There was no mention of Harllel Jones having fur-

nished the gun to Harvey and, of course, the implication was that it came out of the trunk of Bobo's car. At the end of the statement, Harvey was asked if there was "anything else you can tell us about this murder?" He replied "No."

Prior to trial Victor Harvey was declared a material witness for the state and all charges against him were dismissed. Also prior to the trial, Jones' counsel made a timely demand to the prosecution that it produce all exculpatory statements in its possession, either written or oral, and specifically any statements which might have been given by Harvey. Without express mention of Harvey's statement, the court generally directed the prosecution to provide the defense with any exculpatory material. The prosecutor denied having any exculpatory evidence from Harvey or anyone else and did not turn over Harvey's statement. The petitioner never saw the written statement itself until it was produced during the habeas corpus proceedings in the federal district court.

Under the foregoing circumstances the district court held that the nondisclosure of Harvey's statement was a violation of Jones' right to due process under the Fourteenth Amendment as described in *Brady v. Maryland, supra, Moore v. Illinois,* 408 U.S. 786 (1972), and more recently *United States v. Agurs, supra.* We agree.

Because the statement itself made no express reference to Harllel Jones, the state urges that it was neutral and hence not favorable to Jones. Whether evidence in written form is exculpatory or favorable is, we think, an issue of fact to be determined not merely from its contents but its significance in the light of all the attendant circumstances. Following a lengthy evidentiary hearing and extensive findings of fact, the district court concluded that

Harvey's statement was exculpatory. That the statement itself made no reference to Harllel Jones himself is, of course, a factor carefully to be considered, but we do not deem it controlling, as the state would urge in the context of the circumstances.

The evidence in the case showed that the Afro Set members had divided into two groups to go out and wreak their vengeance. Riding in the car that was involved in the shootings in question, Harvey was in a position to have knowledge concerning the involvement or non-involvement of Harllel Jones, and of course whether Jones had furnished him the shotgun.

The interest of defense counsel in whether the prosecution had a statement from Harvey was fully justified at the later evidentiary hearing in the district court. Jones and his counsel believed that Harvey, if called to testify at the state trial, would absolve Jones of any knowledge of or participation in the crimes, as did the two other witnesses.[3] Nevertheless, because Harvey had been de-

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3. If Victor Harvey had testified at the trial as he did at the evidentiary hearing, and if his testimony was believed, it would indeed have been exculpatory:

> Q. Victor, does this statement represent everything you told the police on that afternoon that you gave a statement, or morning, with your uncle present?
>
> A. No.
>
> Q. What is not in this statement, Victor, that you told the police when you made your statement?
>
> A. They had asked me about an alert being called and a meeting.
>
> Q. And what did you tell them? How did you answer that question?
>
> A. No, there wasn't no alert that night.
>
> Q. I'm sorry, did they ask you who called the alert?
>
> THE COURT: Call whom?
>
> MR. FRIEDMAN: An alert, your Honor.
>
> A. Yes, they asked me had Harllel called an alert.

(*Continued on following page*)

clared a material witness and because the government had dismissed the charges against him, they were not at all certain of his reliability, especially if it developed

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Footnote continued—

Q. Harllel who?
A. Jones.
Q. And what was your answer to that?
A. No.
Q. Did they ask you any other questions?
A. Did a meeting take place down on 55th at George's or the Casa Blanca.
Q. And what did you tell them to that?
A. No.
Q. And did they ask you any other questions that aren't in your report—statement?
A. They asked had any more cars went out that night.
Q. And what was your answer to that?
A. No.
Q. Did they ask you anything else that you can recollect or remember?
A. They asked me was Harllel Jones down on 55th that night.
Q. And what did you answer to that?
A. No.
Q. These are statements that you gave the police?
A. Yes.
Q. And you do not see it in your report?
A. No.

* * * * *

Q. One thing I would like to ask you about the incident that took place there: Where did you get the gun?
A. From Marvin Bobo.

* * * * *

Q. Is that the first time you ever saw that gun?
A. I believe so.

* * * * *

Q. Isn't it true that Harllel Jones gave you the gun at the Afro set?
A. No.
Q. And isn't it true that you put the gun into the trunk of Marvin Bobo's car?
A. No.

that the statement actually incriminated Jones, as indeed, it had the other participants. The question was vital to the defense's decision as to whether to call Harvey. In his opinion, the district judge observed:

> But, in fact, the defense was restrained from using Harvey as a witness by the fear that Harvey had made a statement incriminating the petitioner. This fear was generated by the state's own actions—particularly its failure to disclose Harvey's statement—and certainly was not, under the circumstances, irrational. Despite the fact that Victor Harvey was a direct participant in the killing, the charges against him had been dropped and he had been declared a material witness for the state. . . . Though Harvey was never called as a witness for the state, the risk that he had incriminated Jones in his statement to the police thus appeared to the defense counsel to be too great to allow him to take the stand.

In *Moore v. Illinois, supra,* the Supreme Court summarized the elements of the *Brady* rule:

> The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence.

408 U.S. at 794-95.

In *United States v. Agurs, supra,* the Court noted a distinction in the materiality test between those cases in which specific information has been requested by the defense and those in which it has not:

> The test of materiality in the case like *Brady* in which specific information has been requested by the defense is not necessarily the same as in a case in which no such request has been made. . . . Before addressing that question, a brief comment on the function of the request is appropriate.
>
> In *Brady* the request was specific. It gave the prosecutor notice of exactly what the defense desired. Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.

427 U.S. at 106 (footnote omitted).

We deem the foregoing language from *Agurs* to be controlling here. The defense specifically requested the information. The statement of an eyewitness to a crime which makes no reference even to the presence of the defendant or his participation must be viewed as a potentially powerful exculpation. Nor, as pointed out by Justice Stevens in *Agurs,* is it unfair to cast such a burden of evaluation upon the prosecutor where the request is timely and specific, especially where the prosecutor had to be aware of all of the attendant circumstances and of the importance of the testimony.

We need not decide what would have been the result had the prosecutor submitted the problem to the trial judge for resolution and had the trial judge, after an appropriate hearing, determined that the statement was not in fact exculpatory or favorable. Nor need we decide the impact of a similar decision in a post-conviction evidentiary hearing in the state court, as no findings were made on this issue. Nor need we find that the evidence was "obviously exculpatory," a standard we applied in *Wagster v. Overberg,* 560 F. 2d 735, 739 (6th Cir. 1977), where there was merely a generalized request.

Following the guidance of *Agurs,* we conclude that the defense in specifically requesting the statement had a substantial basis for claiming both that it was exculpatory and for claiming that it was material. If Harvey obtained the shotgun from Marvin Bobo's trunk, there is at least a strong inference that he did not get it from Harllel Jones. If, as his statement indicated, he could tell the government agents nothing more about the murder than he had already revealed, there is at least a reasonable inference that Jones did not participate in the discussion with the other members leading to the shootings. It is true, as the state urges, that it could be inferred that Victor Harvey was simply being evasive or that he was lying. However, the duty to disclose favorable evidence cannot be so conditioned. That subjective evaluation was not for the prosecutor to make.

We need not determine here with finality whether the statement would have been admissible, although at least some applications come quickly in mind. The statement itself was hearsay without a doubt, but even hearsay evidence is admissible in the absence of objection. As found by the district judge, it is altogether likely that, armed with the knowledge of the contents of the statement, the defense would have called Victor Harvey. Had it done so, the statement might have been admissible as an exception to the hearsay rule for past recollection recorded or

used for impeachment if Harvey became hostile and sought to implicate Jones when called to testify. We conceive under *Agurs* that the threshold of materiality is relatively low where a specific request is involved.

We readily recognize the burden which this ruling places upon the State of Ohio, by requiring a new trial so long after the event. Nevertheless, we do not know how the principles enunciated in *Brady* and *Agurs* can be otherwise preserved.

In view of our holding on the *Brady* issue, we need not reach the other issues raised on cross-appeal by the petitioner.

Affirmed.

MEMORANDUM AND ORDER OF THE DISTRICT COURT

(Filed February 10, 1977)

C75-530

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HARLLEL B. JONES,
Petitioner,

vs.

A. R. JAGO, Superintendent of the Southern Ohio Correctional Facility,
Respondent.

MEMORANDUM OPINION AND ORDER

BATTISTI, *C.J.*

Harllel Jones, the petitioner herein, seeks a writ of habeas corpus pursuant to 28 U.S.C. §2254. His initial petition stated nine separate grounds for the issuance of the writ. In response to pleadings filed by the respondent, this court entered an order on November 7, 1975 dismissing most of the grounds stated therein, but ruling that an evidentiary hearing was necessary as to the following three contentions:

1. That the petitioner was denied due process of law by virtue of the state's suppression of an exculpatory statement from one Victor John Harvey.

2. That the petitioner was denied due process by the State's failure to disclose a promise of leniency made to Robert Perry, the State's key witness.

3. That the petitioner was denied due process and his right to effective counsel by the involvement of Robert Perry and his counsel in the strategy and planning councils of the defense.

The evidence presented at this hearing raised substantial constitutional questions with regard to each of these contentions. The petitioner's most compelling argument, however, concerns the failure of the state to divulge the pretrial statement made by Victor Harvey. Since the court is compelled to find, for the reasons stated below, that the petitioner's constitutional right to a fair trial has been violated by the State's suppression of this evidence, it is unnecessary to reach the other issues raised by the petitioner.

The petitioner was indicted along with Marvin Bobo, Victor Harvey, James Moore and Robert Perry on October 1, 1971 and charged with murder in the first degree and with shooting with intent to kill or wound, in connection with the killing of John Howard Smith and the wounding of Harlowe Tate which occurred on August 7, 1970. He was convicted on March 28, 1972 of second degree murder and shooting with intent to kill or wound and sentenced to an indeterminate life sentence and a concurrent sentence of one to twenty years, which he is currently serving.

The State's theory in its prosecution of the petitioner was based on the liability of an aider and abettor as provided in O.R.C. §1.17. The State alleged that on the evening of August 6, 1970, the petitioner, as leader of an organization called the Afro Set, called a "red alert" meeting of the Afro Set and ordered its members to shoot police

officers and security guards randomly in retaliation for the fatal shooting of one Willie Lofton, an Afro Set member, by a security guard. The State contended that, pursuant to these orders, Afro Set members Marvin Bobo, James Moore, Victor Harvey and Robert Perry, riding together in Marvin Bobo's automobile, committed the shootings in question in the early morning of August 7, 1970. The State's case rested principally upon the testimony of Robert Perry, who had become a confidential F.B.I. informant a few months prior to the petitioner's trial. His testimony was the key evidence linking Afro Set members with the shootings of August 7 and establishing that those members were acting at the petitioner's directions.

Victor Harvey was a participant in the shootings and at the age of 15, one of the original defendants in this case. The charges against him in this case were, however, ultimately dropped by the State. While in custody at the Juvenile Detention Home, Victor Harvey was questioned by and made a statement to the Cleveland Police. The written portion of this statement, typed by a member of the Cleveland Police and signed by Victor Harvey, is an account of events of the night in which the shootings occurred. Victor Harvey states therein that he heard of the killing of Willie Lofton at McDonalds restaurant at the Afro Set Headquarters after a phone call came in to the shop; that he went to McDonalds with the others at the shop; that he then rode to 55th street with Marvin Bobo, who parked his car on Authwaite; that he waited near the car while Bobo walked toward 55th street; that he saw a shotgun in the trunk of Bobo's car while at 55th street; that Bobo returned with James Moore and Robert Perry; and that all four left in Bobo's car. The statement continues to recount a series of shooting incidents, which include those involving John Howard Smith

and Harlow Tate, committed that night by these four individuals. Nowhere in the statement is there any mention made of a meeting at the Afro Set Headquarters or of any directions issued by Harllel Jones. Indeed, there is no mention of Harllel Jones at all in the written statement except the identification of his picture, which is made by Victor Harvey.

The petitioner contends that Victor Harvey was questioned by the police at the time the statement was taken as to the involvement of Harllel Jones and that Harvey orally stated that Jones had neither called an alert nor had any prior knowledge of the killing. No such questioning or statements concerning Jones' involvement appear on the face of the written statement. The petitioner's contention is supported by the testimony of Victor Harvey and his stepfather, who was present when the statement was made. The state argues to the contrary that Victor Harvey made no such statement concerning Harllel Jones and that, indeed, he had prefaced his statement with the qualifying remark that he would not comment on any involvement of Harllel Jones. This question of fact is one which cannot be confidently decided on the basis of the evidence received. Analysis of the materiality of the written statement as it appears on its face, however, renders it ultimately unnecessary to resolve this factual dispute.

In *Brady v. Maryland,* 373 U.S. 83, 87 (1963), the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In *Moore v. Illinois,* 408 U.S. 786, 794-479 (1972) the Supreme Court stated:

> The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence.

It is undisputed that the defense made a specific request for the production of Victor Harvey's statement. The state contends, however, that the statement which it received from Victor Harvey was neither favorable to the defense nor sufficiently material to compel production under *Brady.*

In the state's case in chief, Robert Perry testified that Victor Harvey was at the "red alert" meeting at which Jones ordered the killing and that at that meeting Harllel Jones gave Victor Harvey a shotgun with which to carry out this order. The state contends that since Victor Harvey's written statement does not expressly deny that such a meeting took place or that he received a shotgun from Jones, it cannot be construed as favorable to the petitioner. But, while it is true that the statement is not unambiguous, the failure to mention any involvement of Harllel Jones must certainly be construed as at least "favorable" to the defense. Harvey's statement, after all, gave a fairly detailed account of the events of the night. To the question, "Is there anything else you can tell us about the murder?", Harvey answered "No." The statement would seem, then, to indicate by omission that Harvey did not attend a red alert meeting that night. Harvey, furthermore, stated at one point within his narrative that "I saw a shotgun in the trunk of Bobo's car." This statement seems on its face to indicate that Harvey saw the

shotgun for the first time in Bobo's trunk and, hence, that he was not given the gun by Jones. Though the ambiguous nature of the statement could have limited its evidentiary impact had it been introduced at trial, the statement appears on its face to be favorable to the defense.

The harder question is whether the statement is, in view of its ambiguities and omissions, sufficiently material to compel disclosure. The Supreme Court noted in *United States v. Agurs*, ... U.S. ....., 96 S. Ct. 2392, 49 L. Ed. 2d 342, 350 (1976), that "implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." Certainly the failure to disclose evidence which, although "favorable" for the defense, is so insubstantial that it could not possibly have affected the outcome would not constitute a constitutional violation.

In *Agurs*, the Supreme Court established the standard of materiality to be applied to evidence which has not been specifically requested by the defense. The court held that a defendant's constitutional rights have been violated if it can be concluded after examining the entire record that the undisclosed evidence "creates a reasonable doubt that did not otherwise exist." *Id.*, 49 L. Ed. 2d at 355. The court was, however, careful to note that this standard of materiality was "not necessarily the same" as that which should be applied in cases where the undisclosed information was specifically requested. The court did not attempt to define the applicable standard of materiality in such cases but clearly indicated that a lesser showing of materiality would be required:

> In Brady the request was specific. It gave the prosecutor notice of exactly what the defense desired. Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor received a specific and relevant request, the failure to make any response is seldom, if ever, excusable. *Id.*, 49 L. Ed. 2d at 357.

Thus, even if the definition of materiality is not changed where a specific request has been made, the Court suggests here that the burden of proving materiality should be diminished in those instances, since disclosure should be required even if there is only a "substantial basis" for claiming materiality.

The distinction suggested in *Agurs* between cases where the omitted evidence was the subject of a specific request and cases where it was not specifically requested reflects the exigencies of the prosecutor's circumstances. The prosecutor cannot generally be expected to be sufficiently familiar with the case for the defense to be able to anticipate which information in his file is important to the defense without a specific request. As Judge Friendly noted in *United States v. Keogh*, 391 F.2d 138 (2d Cir. 1968), a specific request "serves the valuable office of flagging the importance of the evidence for the defense." It should be noted that in this case the prosecution had considerable notice of the importance of the statement of Victor Harvey to the defense. A specific request for the statement was made once at a pre-trial hearing

and again at the beginning of the trial. The defense, indeed, requested the opportunity to question Lieutenant Fuerst under oath as to the existence of an exculpatory statement, but this request was successfully resisted by the prosecution.

The minimum standard of materiality to be applied in a case such as this has not yet been defined by the Supreme Court. It may be noted that other courts have in the past applied standards of materiality both in cases where there was and was not a specific request made for the omitted evidence which are less restrictive than that defined in *Agurs*. Courts of Appeal have held, for instance, that where the suppression was unintentional the test of constitutional error is "whether there was a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *e.g. United States v. Miller*, 524 F.2d 550, 553 (2d Cir. 1974); *Ogden v. Wolff*, 522 F.2d 816, 822 (8th Cir. 1974); *Shuler v. Wainwright*, 491 F.2d 1212, 1223 (5th Cir. 1974). If the suppression of evidence of known value to the defense was "intentional", it has been held that a new trial is warranted if the evidence is "merely material or favorable to the defense" *e.g. United States v. Morell*, 524 F.2d 550, 553 (2nd Cir. 1974). Indeed, courts have stated that "In cases involving the deliberate suppression of exculpatory evidence the courts will not inquire into the elusive question of actual prejudice." *United States v. Harris*, 462 F.2d 1033, 1035 (10th Cir., 1972), quoted in *Shuler v. Wainwright*, 401 F.2d 1213, 1223 (CA 5, 1974).

Under the circumstances of this case, however, it is unnecessary to determine the minimum standard of materiality which must be met to merit a new trial. It is clear

to the court that the petitioner has successfully demonstrated that there is at least a "substantial basis" for the claim that the omitted evidence creates a reasonable doubt as to guilt which did not otherwise exist. The opinion in *Agurs* indicates that, while a lower standard may be acceptable, a greater showing of materiality than this should not be required where the omitted evidence was specifically requested. And, certainly, in meeting this test, the various other standards mentioned above are also satisfied.

The importance of this statement to the defense must be evaluated within the context of the trial record. Harllel Jones was convicted primarily on the testimony of Robert Perry. Perry testified that Jones, as leader of the Afro Set, called a "red alert" meeting after the shooting of Willie Lofton, an Afro Set member. At this meeting, according to Perry's testimony, Jones ordered Afro Set members to retaliate for the death of Lofton by shooting security guards or police. Perry also stated that Jones gave Victor Harvey a shotgun at this meeting. Kenneth Malone, who was also an Afro Set member, appeared as a rebuttal witness for the State and substantially confirmed Perry's testimony.

The defense, on the other hand, also put two Afro Set members on the stand, both of whom testified to the contrary that there was no alert meeting called that night. Marvin Bobo, who had already pleaded guilty to this murder, testified that he and the others riding in his car undertook the retaliatory killing without the authorization or knowledge of Harllel Jones. Bobo also stated that he gave Victor Harvey a shotgun from the trunk of his car.

The case against Harllel Jones was, then, clearly far from overwhelming. The testimony was conflicting and

its resolution depended entirely on the jury's evaluation of the credibility of the witnesses. Furthermore, the credibility of the state's principle witness was at least open to attack, since he was himself directly involved in the killing and had been a paid FBI informer prior to the trial.

The impact of Victor Harvey's statement would, of course, have depended upon the manner in which the jury resolved its ambiguities. If the jury interpreted the statement as the state argues it should, as suggesting nothing as to the involvement or non-involvement of Harllel Jones, then, of course, it could have been of no value to the petitioner. But if the jury interpreted the statement, as appears more reasonable, to suggest that there was no alert meeting and that Harvey did not receive the shotgun from Jones, it would have been of some use to the petitioner. And, of course, if the jury relied on this interpretation and found the statement credible, the petitioner would have been exonerated.

The use of Victor Harvey's statement as evidence at trial would have required Victor Harvey to take the stand to affirm it as his own. The evidentiary weight of the statement would have depended not only upon its written content but upon any oral testimony which Victor Harvey might have given in explaining its ambiguities and omissions. Victor Harvey has stated to this court that he would have testified that there was no red-alert meeting the night of the shooting and that, as Marvin Bobo also testified, he received the shotgun from the trunk of Bobo's car and not from Jones. Since Victor Harvey has also indicated to the defense investigator before the trial began that he would testify in Jones' favor, there is good reason to believe that this would have been the substance of his testimony. With such supporting testimony clarifying the ambiguities and omissions in the written statement, it ap-

pears clear that this evidence might have effected the outcome of the trial considering the balance of the other evidence. The jury might still, of course, have chosen to disbelieve Victor Harvey and found the petitioner guilty, but the evaluation of credibility should, in this instance, be the province of the trial jury and not this court. It is sufficient that we find that there is a "substantial basis" for the claim that the undisclosed evidence raises a reasonable doubt as to guilt. Certainly a statement by a direct participant in the killing which can be reasonably interpreted in such a way as to negate guilt, or at least cast considerable doubt on the reliability of the state's principle witness, must, in the circumstance of this case, be regarded as sufficiently material to compel disclosure.

It should be noted that the State has argued further that the statement should not be considered material because Victor Harvey was himself freely available to the defense *and had indeed, given a substantially similar statement to the defense.** The defense, according to the State's view, had the full opportunity to present Victor Harvey's testimony but failed to make use of it. But, in fact, the defense was restrained from using Harvey as a witness by the fear that Harvey had made a statement incriminating the petitioner. This fear was generated by the State's own actions—particularly its failure to disclose Harvey's statement—and certainly was not, under the circumstances, irrational. Despite the fact that Victor Harvey was a direct participant in the killing, the charges against him had been dropped and he had been declared a material witness for the state. Before the trial began, the defense, which had no knowledge of Perry's eventual testimony, naturally suspected that Harvey would be a witness for the State. The defense was aware that Harvey had given

*Emphasis added.

a statement to the police and assumed that if it was, as Harvey had told them, exculpatory, it would be given to them upon their request to the State. After the State repeatedly denied that it had exculpatory evidence from Harvey, the defense had good reason to suspect that Harvey had implicated Jones in his statement. This suspicion was reinforced by the conduct of Robert Perry, who had likewise told the defense investigator before the trial that Jones was not involved in these crimes but then testified against Jones during the trial. Though Harvey was never called as a witness for the State, the risk that he had incriminated Jones in his statement to the police thus appeared to the defense counsel to be too great to allow him to take the stand.

The harm caused by the State's failure to disclose Victor Harvey's statement is not, then, mitigated by Harvey's availability as a witness and apparent willingness to testify for the defense, but, in fact, considerably aggravated. By withholding the statement the State not only denied the defense the use of the statement itself but effectively prevented the defense from using Victor Harvey as a witness. In view of the insistent requests by the defense for exculpatory statements by Victor Harvey, it is; indeed, somewhat difficult to believe that the state was unaware of the dilemma it had created for the defense. But it is unnecessary for the court to decide if the State's conduct was, as the petitioner complains, deliberately calculated to discredit the reliability of Victor Harvey as a defense witness. It is, at any rate, clear that this was the effect of the State's actions. The State cannot, therefore, be permitted to argue now that its failure to disclose Harvey's statement could not have prejudiced the defense.

In view of the substantial criminal activity attributed by the police to the Afro Set in the often turbulent years

preceding the petitioner's arrest, the apparent over-zealousness of the State in pursuit of the petitioner's conviction is, at least, understandable. The State must, however, be reminded that, as Justice Fortas stated,

> A criminal trial is not a game in which the State's function is to outwit and entrap its quary. The State's pursuit is justice, not a victim. *Giles v. Maryland,* 386 U.S. 66, 100 (1966).

This court is charged with the duty of assuring that no citizen, whatever his associations, is deprived of his liberty without a constitutionally fair trial. Accordingly, the writ shall issue and the petitioner shall be released unless within 90 days of this order the State begins new trial proceedings against him.

IT IS SO ORDERED.

/s/ FRANK J. BATTISTI
Chief Judge

(Illegible)
11:00 A.M.

STATEMENT OF VICTOR JOHN HARVEY

The following is the statement of VICTOR JOHN HARVEY (C) Age 15, DOB 2-12-56, residing at 14515 Stratmore, home phone 249-6712, unemployed, attending Shaw High school 9th grade, regarding the HOMICIDE OF JOHN H. SMITH.

VICTOR JOHN HARVEY: I am a member of the Afro set on Hough Avenue. I have been a member for about a year and a half. I was under Richard Harvey my uncle, he was the minister of youth. Richards in the Marines now.

Some time in the summer of last year a Security guard at the Mc Donalds restaurant at 83rd and Euclid Avenue killed a brother, Willie Lofton in the parking lot of the restaurant. I heard about the killing while I was at the Afro shop over on Hough, a phone call came in to the shop. Everybody that was at the shop left and walked over to the McDonalds to see. Me and Richard walked over there. After we got to Mc Donalds Richard left with someone else and went someplace. I don't know who he left with.

I waited at Mc Donalds for a while then everybody was going to leave and Bo-X he was going to take me home. We got into his car and drove down to 55th and he parked on Authwaite. He walked towards 55th abd I stayed by the car on Authwaite. I saw a dude I know and we started talking. When I got into BO's car and we got to 55th and I saw a shotgun in the trunk of BO's car, I think it was a pump shotgun, it was loaded.

Bo came back with Jamay and Amear and we all got back in BO's car and drove back to 55 and ended up on a freeway or something. We were driving on the freeway and we come up to a car and BO said to me, "GET THIS ONE" and I stuck the shotgun out the window and pointed it at the driver but the safty was on and the gun dident' go off, I had put the safety on myself. So we kept on driving, down the freeway we drove past another car I don't know how many peaople were in this car and Jamey started shooting out the window at the car, Jamey was sitting in the back seat with me. BO was shooting from the front seat with a hand gun while he was driving. Amear was sitting in the front passenger seat but he diden't shoot. The car we shot at went about half way up the turnoff and then came back onto the freeqay and hit the center rail. We kept on going and Jamey said "I GOT THAT ONE", and he started laughing. Then they took me home over to my grandmothers house on East 87th street, 1765 E 87th.

I forgot, when we were comming off the freeway onto e 55thst we saw a car in front of us and we drove past it and when we did Amear started shooting out the window at the car and the car stopped, we kept going. then I wnet home.

The next day i went down to the shop and I heard some of the brothers had been arrested the night before for carring concealed weapons. One of them was REED, another PITTMAN, KEN MALONE I don't know who the other one was.

Q. Showing you a CPD photo # M 2362 of a colored male, what can you tell me about this male?

A. That's JAMEY, he was in the car, the police tell me his real name is JAMES MOORE.

Q. Showing you a CPD photo# 140769, what can you tell me about this male?

A. That's AMEAR, the police tell me his real name is ROBERT PERRY.

Q. Showing you a photo identified by # PL 10084, what can you tellme about this male?

A. that's BO-X, the police tell me his real name is MARVIN BOBO.

Q. Showing you a CPD photo#,119145 what can you tell me about this male?

A. That's Judia, the police tell me his real name is DONALD WILLIAMS.

Q. Showing you a CPD photo# 165677 what can you tell me about this male?

A. That's HARLELL JONES the priminister of the Afro Set.

CON'T ON PAGE TWO.

Signed /s/ Victor Harvey
Witness /s/ Robert Sparkman
Robert Sparkman (Step father)

Q. Did you at any time, the night of August 7, 1970, or early morning of August 7, 1970, about 1:15 A.M., fire any shots at the auto of JOHN H, SMITH on the inner-belt freeway at the Superior Avenue Exit, at which time HOHN SMITH was shot and killed?

A. No.

Q. Did you fire any shots at the auto of HARLOWE TATE on East 55th street near Diamond Avenue, at which time mr TATE suffered gun shot wounds as a result of being shot inhis auto? the night of August 7, 1970.

A. No.

Q. Was anyone in the auto driven by MARVIN BOBO the night of the SMITH MURDER, under the influence of narcotics of alchohal.

A. I don't know.

Q. Why are you making this statement to the police?

A. Because I want to tell the truth and because my step father here told me to.

Q. Your step father Robert Sparkman is present here now while this statement is being taken, is that right Victor?

A. yes.

Q. Is there anything else you cam tell us about this murder?

A. No

Q. Have you read the above statement and is it the truth?

A. Yes

Signed /s/ Victor Harvey
Witness /s/ Robert Sparkman
Robert Sparkman (Step Father of Victor Harvey)

Witness /s/ Monte Mahon Sgt
Witness
Det. Robert Shankland Det.# 104 12:15 P.M.
/s/ Robert Shankland Dt. 1040

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78 - 135

ARNOLD R. JAGO, Superintendent,

Petitioner,

vs.

HARLLEL B. JONES,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Respondent, Harllel B. Jones, submits this brief in opposition to the Petition of Arnold R. Jago that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this matter on May 3, 1978.

Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit, included in Petitioner's Appendix at p. A1, is reported at 575 F.2d. 1164 (6th Cir. 1978). The opinion of the Federal District Court for the Northern District of Ohio, included in Petitioner's Appendix at p. A11, is reported at 428 F.Supp. 405 (N.D. Ohio 1977).

Question Presented

Whether the court below correctly concluded, in light of this Court's decisions in Brady v. Maryland, 373 U.S. 83 (1963),

Moore v. Illinois, 408 U.S. 786 (1972) and United States v. Agurs, 427 U.S. 97 (1976), that a defendant charged with aiding and abetting murder, in a case whose outcome depends entirely on the jury's evaluation of the credibility of the witnesses, is denied due process of law by the prosecution's suppression, in the face of specific and timely defense requests for disclosure, of a statement provided to the police by a participant in the killing, when that statement makes no mention of defendant's involvement in the crime and otherwise contradicts the testimony of the prosecution's key witness, whose credibility was already open to attack, and when such suppression, combined with the prosecution's conduct in dismissing all charges against the author of the statement and in having him declared a material witness for the state, effectively prevents the defendant from using the author of the statement as a witness at trial?

Statement of the Case

In general, Respondent is prepared to rely on the facts set forth in the opinions of the District Court and the Court of Appeals, which are included in Petitioner's Appendix and officially reported at 428 F.Supp. 405 (N.D. Ohio 1977), 575 F.2d 1164 (6th Cir. 1978), respectively.

Petitioner's statement is essentially correct. Respondent would, however, point out that Petitioner's assertion, included in the statement at p. 4 and repeated elsewhere in the Brief at pp. 8-10, that Respondent's attorney also represented Victor Harvey must be qualified. Although Respondent's attorney represented Victor Harvey shortly after the time that the indictments were returned in the instant case, he no longer represented Harvey at the time of Respondent's trial or at the time, prior to Respondent's trial, when the requests were made for the disclosure of Harvey's statement. See Joint Appendix Below at pp. 108, 115-117.

Respondent would further point out that Petitioner's recitals that "Victor Harvey was freely available to the defense" and that the defense was "free to call Harvey if they desired" (Petioner's Brief at p. 5) are wholly at odds with the explicit and unassailable findings of fact made by the District Court and affirmed by the Court of Appeals. In point of fact the District Court found not only that "the defense was restrained" and "effectively prevented ... from using Victor Harvey as a witness", but also that "this was the effect of the State's actions." 428 F.Supp. at 410-411; Petitioner's Appendix at p. A21-22. The Court of Appeals sustained these findings. 575 F.2d at 1167 - 1168; Petitioner's Appendix at p. A7.

Reasons For Denying The Petition

I

The Decision Below Does Not Conflict With Either The Decisions Of This Court Or The Decisions Of Other Circuit Courts Concerning The Prosecution's Constitutional Duty To Disclose Exculpatory Evidence Specifically Requested By A Criminal Defendant

Petitioner has characterized the ruling below as "a decision on an important question of constitutional law that conflicts with the decisions of this Court," Petitioner's Brief at p. 6. But, quite to the contrary, the decision of the Sixth Circuit is in complete harmony with the leading decisions of this Court in Brady v. Maryland, 373 U.S. 83 (1963), Moore v. Illinois, 408 U.S. 786 (1972); and United States v. Agurs, 427 U.S. 97 (1976) as well as with the decisions of other Circuit Courts.

Under the law announced in Brady, Moore and Agurs, supra, one who seeks to show a violation of due process must establish three factors: (1) the prosecution's suppression of evidence; (2) the favorable character of the evidence for the defense,

and (3) the materiality of the suppressed evidence to the issue of guilt or punishment. The determination of materiality is made by evaluating the suppresed evidence "in the context of the entire record." Agurs, supra at 112 (footnote omitted). Moreover, the determination of materiality turns on the standard employed.

When the defense has failed to specifically request disclosure of the suppressed evidence, the evidence will be regarded as material and a denial of due process can be found only "if the omitted evidence creates a reasonable doubt that did not otherwise exist." Agurs, supra at 112. However, when the suppressed evidence has been specifically requested by the defense, a less stringent standard of materiality is employed. Agurs, supra at 106.[1] In such a case, as this Court stated in Agurs, id:

> [I]f the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.

In affirming the grant of habeas corpus relief to Respondent, the court below rendered a decision which is wholly in accord with the foregoing well-settled propositions of law. There was never any dispute as to the prosecution's failure to disclose the statement of Victor Harvey to the defense.

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1. Every Circuit Court decision which has spoken to this matter in the wake of Agurs has agreed on this point. See eg., United States v. McCrane, 547 F.2d 204, 207 (3rd Cir. 1976) on remand from 427 U.S. 910 (1976); Cannon v. State of Alabama, 558 F.2d 1211, 1213 (5th Cir. 1977); United States v. Mackey, 571 F.2d 376, 388 - 89 (7th Cir. 1978); Skinner v. Cardwell, 564 F.2d 1381, 1384-85 (9th Cir. 1977).

On the question of the statement's favorable character to the defense, the Circuit Court concurred in the District Court's finding of fact that, in light of the attendant circumstances, the statement was exculpatory. 575 F.2d at 1166-67, 1168; Petitioner's Appendix at p. A4-5, A8. In so doing, the Circuit Court emphasized the fact that Harvey, being a participant in and eyewitness to the murder, was in a position to know whether respondent was invovlved, and yet his statement, while relating in detail his own involvement and that of all others in the killing, and while purporting on its face to recount everything he knew about the killing, made no mention of Respondent's presence or participation. Id. Also emphasized on this score was the fact that Harvey's statement indicated that he had obtained his weapon on the evening of the murder from the trunk of his co-participant's car, rather than, as the prosecution's key witness testified, from the Respondent. Id.

Regarding the matter of the materiality of the suppressed evidence, the Circuit Court determined that since Victor Harvey's statement was specifically requested the applicable test was whether there was a substantial basis for claiming that the statement was material. 575 F.2d at 1168-69; Petitioner's Appendix at p. A7-10. The court further concluded that this test had been satisfied,[2] given the exculpatory character of the statement and the fact, as found by the district judge, that it was likely that the defense would have called Harvey as a witness at trial had his statement been disclosed, Id.

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2. It should be observed that the District Court concluded that Respondent had satisfied a more stringent standard of materiality, since it found that Respondent had "demonstrated that there is at least a 'substantial basis' for the claim that the omitted evidence creates a reasonable doubt which did not otherwise exist." 428 F.Supp. at 409; Petitioner's Appendix at p. A18-19. The Circuit Court did not address this aspect of the District Court's decision.

In effect, the Circuit Court properly concluded, on the basis of extensive, detailed and unassailable findings of fact rendered by the District Court, that each of the predicates of a due process violation had been established in this case. Nothing was said or decided which conflicts in any way with the decisions of this Court. Nor were any important and unsettled issues of constitutional law decided.

In offering a contrary characterization of the decision below, Petitioner points to the Circuit Court's observation that this case "presents an unusual question" as to whether under this Court's decisions "an eyewitness statement suppressed by the government can be exculpatory where it makes no reference to the defendant." 575 F.2d at 1165; Petitioner's Appendix at A1. Furthermore, Petitioner argues that this "unusual question" was decided below in a manner inconsistent with this Court's decisions. Petitioner's Brief at p. 7. Clearly, this argument fails on several grounds.

In the first place, there is nothing in this Court's decisions which even remotely suggests that an eyewitness statement cannot be regarded as exculpatory when it makes no reference to the defendant. Secondly, the Circuit Court did not treat this question as one of law, rather it ruled that whether suppressed evidence is exculpatory is "an issue of fact," 575 F.2d at 1166; Petitioner's Appendix at p. A4.

Thirdly, and more importantly, both logic and precedent combine to support the Circuit Court's observation that an eyewitness statement which makes no mention of a defendant's participation in a crime "must be viewed as potentially powerful exculpation." 575 F.2d at 1168; Petitioner's Appendix at p. A8. Indeed, the Circuit Courts have quite often set aside convictions because of prosecutorial suppression of this type of evidence. See eg., Cannon v. State of Alabama, supra;

is a specific request case, the decision below on this issue is not in conflict with this Court's decisions.

In a further attempt to buttress its characterization of the decision below, the Petitioner asserts that since Victor Harvey had provided the defense with a statement "substantially similar" to the one which the prosecution failed to disclose, the Circuit Court's decision that Harvey's statement was suppressed is at odds with this Court's decisions. Petitioner's Brief at pp. 6, 8-11. To support this assertion, Petitioner relies principally on the proposition expressed by this Court in Agurs, supra at 103, that "[t]he rule of Brady ... involves the discovery after trial of information which had been known to the prosecution but unknown to the defense."

This effort by Petitioner to present the decision below as being novel and conflicting must also fail. The problem with Petitioner's argument is that it ignores entirely the extensive factual foundation for the Circuit Court's proper and uncontroversial determination that the suppression of evidence occurred herein.

To begin with, the Petitioner overlooks the fact that the information found to have been suppressed in this case was not what Victor Harvey said he told the police, but rather what Victor Harvey actually told the police. What Victor Harvey actually told the police is contained in the statement which the prosecution failed to disclose, despite two specific pretrial requests by the defense. Obviously, this information was not known to the defense. Indeed, it did not become known to the defense until the prosecution tendered Harvey's statement in the course of the habeas corpus proceeding herein. As such, this case quite clearly involved "the discovery after trial of information which had been known to the prosecution but unknown to the defense." Agurs, id..

Hence, the decision below, that this information was suppressed in no way conflicts with this Court's decisions.

Actually, the real thrust of Petitioner's argument is that the defense had reason to believe that Harvey had told the police exactly what he said he told them, and that, since the defense was free to call Harvey as a witness, no real harm could have resulted from the prosectuion's suppression of Harvey's statement. But this argument also ignores the detailed and uncontrovertible fact-findings of the District Court, which were sustained and relied upon by the Circuit Court below.

In response to this very argument the District Court stated:

> But, in fact, the defense was restrained from using Harvey as a witness by the fear that Harvey had made a statement incriminating the petitioner. This fear was generated by the State's own actions - particularly its failure to disclose Harvey's statement - and certainly was not, under the circumstances, irrational. 428 F.Supp. at 410; Petitioner's Appendix at p. A21.

But, in fact, the defense was restrained from using Harvey as a witness by the fear that Harvey had made a statement incriminating the petitioner. This fear was generated by the State's own actions - particularly its failure to disclose Harvey's statement - and certainly was not, under the circumstances, irrational. 428 F.Supp. at 410; Petitioner's Appendix at p. A21.

Among this circumstances alluded to in the above statement were the following: the fact that all charges against Harvey had been dropped, despite the fact that he was a direct participant in the killing; the fact that Harvey had been declared a material witness for the prosecution; the fact that the prosecution repeatedly denied, in open court, that Harvey's statement was exculpatory, thus giving the defense good reason to believe that it implicated the defendant; and the fact that one Robert Perry, who became the prosecution's key witness, also told the defense prior to trial that the defendant was not involved, 428 F.Supp. at 410; Petitioner's Appendix at pp. A21-22.

It should also be observed that the District Court, while deeming it unnecessary to decide whether the prosecution's conduct was "deliberately calculated to discredit the reliability of Victor Harvey as a defense witness," did never the less find "that this was the effect of the State's actions." 428 F.Supp. at 411; Petitioner's Appendix at p. A22. The District Court thus concluded that:

> The State cannot, therefore, be permitted to argue now that its failure to disclose Harvey's Statement could not have prejudiced the defense. Id.

The Circuit Court reached the same conclusion in reliance upon the findings of fact rendered by the District Court. 575 F.2d at 1167-1168; Petitioner's Appendix at p. A5-7. Thus, it was stated below that the matter of what Harvey had actually told the police "was vital to the defense's decision as to whether to call Harvey." 575 F.2d at 1167; Petitioner's Appendix at p. A7.

In light of what has been said, it must be obvious that, in making the argument under discussion, the Petitioner does not call attention to an important and unsettled issue of consitutional law decided by the court below. Nor does Petitioner call attention to a conflict between the decision below and this Court's decisions. Rather, Petitioner does no more than to call attention to its disagreement with the findings of fact upon which the decision below rested in properly concluding that Respondent had been denied due process of law.

II

The Decision Below Does Not Expand The Prosecution's Duty To Disclose Evidence To Criminal Defendants Under the Due Process Clause, Nor Does It In Any Way Create Uncertainty As To The Proper Performance Of That Duty

Petitioner contends that the decision below expands the prosecution's duty to disclose evidence to criminal defendants,

and "creates substantial confusion about the standards utilized by prosecutors in instructing their subordinates of their Brady and Agurs responsibilities...." Petitioner's Brief at pp. 6, 11-12. But these contentions are utterly devoid of merit and essentially oblivious to the fact that this case involves the prosecutorial suppression of exculpatory evidence which was twice specifically requested by the defense.

As noted previously, the decision below does not conflict with this Court's decisions. Such being the case, it certainly does not expand the prosecution's constitutional duty to disclose exculpatory evidence to criminal defendants.

Morover, it creates no uncertainty as to the proper discharge of that constitutional duty. The decision simply instructs, in total conformity with Agurs, supra at 106, that prosecutors will be held to a more exacting duty to disclose exculpatory information, when they are presented with timely and specific requests for such information. There is nothing confusing about such an instruction. Furthermore, all the guidance and clarification that prosecutors need to deal with situations like that involved in the instant case has already been supplied by this Court in Agurs, supra 427 U.S. at 106.

In short, then, the decision below was reached by a straight forward application of settled constitutional principles to detailed fact findings which depicted a clear case of unconstitutional suppression of exculpatory evidence. It does not impose any new and unreasonable burdens on prosecutors, and it certainly generates no uncertainty whatsoever as to what a prosecutor should do when presented with a timely and specific request for exculpatory information.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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